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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 ALTAFLO, LLC, individually and on
7 behalf of all others similarly situated,

8 Plaintiff,

9 v.

10 DUN & BRADSTREET CREDIBILITY
CORPORATION, et al.,

11 Defendants.

C14-1288 TSZ

ORDER

12 THIS MATTER comes before the Court on a motion to dismiss brought by
13 defendant Dun & Bradstreet Credibility Corporation (“DBCC”), docket no. 66. Having
14 reviewed all papers filed in support of, and in opposition to, DBCC’s motion, the Court
15 enters the following order.

16 **Background**

17 Plaintiff Altaflo, LLC brings this action on behalf of itself and a class of all
18 entities in New Jersey that purchased DBCC’s product known as CreditBuilder, which is
19 an Internet-based system for credit self-monitoring. DBCC acquired CreditBuilder from
20 defendants Dun & Bradstreet Corporation and Dun & Bradstreet, Inc. (collectively,
21 “D&B”), along with licenses to use the “Dun & Bradstreet” name, brand, logo, and trade
22 dress. D&B collects financial information and issues credit reports, scores, and ratings
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1 on businesses, which are used by the government, as well as private companies, to make
2 contracting and other commercial decisions. In connection with credit information, D&B
3 uses the Data Universal Number System (“DUNS”), pursuant to which businesses are
4 assigned unique identifiers.

5 According to plaintiff, when businesses contact D&B concerning any problem
6 with their credit reports, they are “uniformly and seamlessly routed to a DBCC sales
7 representative who tries to sell them CreditBuilder, rather than attempt to fix the
8 problem.” Am. Compl. at ¶ 21 (docket no. 64). Plaintiff does not allege, however, that it
9 was solicited in this manner. Instead, plaintiff merely states that it received from DBCC
10 marketing materials that bore the “Dun & Bradstreet” logo and “positioned CreditBuilder
11 as a unique D&B-related product.” *Id.* at ¶ 56. Plaintiff does not indicate when or how
12 these materials arrived. Plaintiff also does not plead that it ever directly communicated
13 with DBCC prior to purchasing CreditBuilder on two occasions, first in May 2011 and
14 then in May 2012, each time for \$499.00. *See id.* at ¶ 41. Plaintiff contends that it
15 “believed it had no choice” but to purchase CreditBuilder because D&B had “seeded” its
16 credit report with false information.¹ *Id.* at ¶¶ 57-58.

17 Plaintiff alleges that DBCC holds itself out as D&B and holds CreditBuilder out as
18 a D&B-affiliated product, and that DBCC touted CreditBuilder as “the solution to false
19 entries” on plaintiff’s credit report, but plaintiff fails to explain when or how DBCC did
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21 ¹ Plaintiff concedes, however, that DBCC was not advised by D&B of any actions taken by D&B to
22 inflate the number of credit inquiries about a business, which would negatively impact its credit rating.
23 *See* Am. Compl. at ¶¶ 6, 38, 50, & 52 (docket no. 64).

1 so. *See id.* at ¶¶ 55 & 61. According to plaintiff, DBCC’s sales representatives refer to
2 D&B’s databases as “*our*” databases, describe credit reporting functions performed by
3 D&B as something “we” do, and indicate that “companies are coming to *us*” (as opposed
4 to D&B) for credit reports. *Id.* at ¶ 27 (emphasis in original). Plaintiff fails, however, to
5 describe any circumstance under which it might have heard DBCC’s sales representatives
6 make these statements.

7 Plaintiff asserts that, in February 2014, D&B published to “FEI” (plaintiff has not
8 defined this acronym) a report incorrectly setting forth credit lines of only \$50,000, when
9 plaintiff’s credit lines were actually over \$500,000. *Id.* at ¶ 63. Plaintiff alleges that, as a
10 result, it lost the opportunity to become a “prime vendor” with FEI. *Id.* In addition, in
11 February 2014, D&B’s database reflected that plaintiff had outstanding loans through
12 TriCo Federal Credit Union (“TriCo”). *Id.* at ¶ 64. According to plaintiff, although
13 TriCo processed the appropriate documentation after plaintiff paid off its loans, D&B
14 failed to update plaintiff’s credit report. *Id.* Plaintiff does not explain how either of these
15 errors was caused by DBCC or resulted from plaintiff’s purchase of CreditBuilder almost
16 two years earlier. Plaintiff has brought two claims against DBCC, namely violation of
17 New Jersey’s Consumer Fraud Act (“CFA”) and negligent misrepresentation. DBCC has
18 moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss both claims.

19 **Discussion**

20 **A. Standard for Motion to Dismiss**

21 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
22 provide detailed factual allegations, it must offer “more than labels and conclusions” and
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1 contain more than a “formulaic recitation of the elements of a cause of action.” Bell Atl.
 2 Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint must indicate more than
 3 mere speculation of a right to relief. Id. When a complaint fails to adequately state a
 4 claim, such deficiency should be “exposed at the point of minimum expenditure of time
 5 and money by the parties and the court.” Id. at 558. A complaint may be lacking for one
 6 of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a
 7 cognizable legal claim. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th
 8 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the
 9 plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. E.g.,
 10 Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The question for the
 11 Court is whether the facts in the complaint sufficiently state a “plausible” ground for
 12 relief. Twombly, 550 U.S. at 570. If the Court dismisses the complaint or portions
 13 thereof, it must consider whether to grant leave to amend. Lopez v. Smith, 203 F.3d 1122,
 14 1130 (9th Cir. 2000).

15 **B. Consumer Fraud Act**

16 By statute, New Jersey has declared to be an “unlawful practice” the use of “any
 17 unconscionable commercial practice, deception, fraud, false pretense, false promise, [or]
 18 misrepresentation” in connection with the sale or advertisement of “any merchandise.”
 19 N.J. Stat. § 56:8-2. Merchandise includes “any objects, wares, goods, commodities, or
 20 services.” N.J. Stat. § 56:8-1. A civil action may be brought by “[a]ny person who
 21 suffers any ascertainable loss of moneys or property . . . as a result of” another person’s
 22 use of an unlawful practice. N.J. Stat. § 56:8-19. An ascertainable loss is one that is
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1 “quantifiable or measurable,” and “not hypothetical or illusory,” but it need not have
2 been experienced yet so long as an estimate of the loss can be “calculated within a
3 reasonable degree of certainty.” Thiedemann v. Mercedes-Benz USA, LLC, 872 A.2d
4 783, 792-93 (N.J. 2005). A party who prevails on a CFA claim is entitled to legal and/or
5 equitable relief and “threefold the damages sustained” by such person, as well as
6 reasonable attorney’s fees and costs. N.J. Stat. § 56:8-19; Hawkins v. Globe Life Ins. Co.,
7 --- F. Supp. 3d ---, 2015 WL 2250467 at *13 (D.N.J. May 13, 2015).

8 A prima facie case under the CFA consists of (i) unlawful conduct by the
9 defendant; (ii) an ascertainable loss by the plaintiff; and (iii) a causal connection between
10 the defendant’s unlawful conduct and the plaintiff’s ascertainable loss. Liebersohn v.
11 Johnson & Johnson Consumer Cos., 865 F. Supp. 2d 529, 538 (D.N.J. 2011). An act
12 may be considered an unlawful practice “whether or not any person has in fact been
13 misled, deceived or damaged thereby.” N.J. Stat. § 56:8-2; see Byrne v. Weichert
14 Realtors, 675 A.2d 235, 240-41 (N.J. Super. Ct. App. Div. 1996) (“A practice can violate
15 the Act even though no one was misled or deceived as a result. . . . It is the ‘capacity to
16 mislead’ that is critical.”). To assess whether a representation is false or misleading, the
17 Court must consider the effect that the statement, “taken as a whole, would produce on
18 one with an ordinary and unsuspecting mind.” Hawkins, 2015 WL 2250467 at *13. New
19 Jersey courts recognize the distinction between false or misleading representations of fact
20 that are actionable and mere puffery about a product that will not support a CFA claim.
21 See Rodio v. Smith, 587 A.2d 621, 624 (N.J. 1991) (holding that insurer’s slogan,
22 “You’re in good hands with Allstate,” is “nothing more than puffery” and did not violate
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the CFA); *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003) (concluding that advertisements indicating the use of an allergy medication would allow a consumer to “lead a normal nearly symptom-free life again” did not state facts, but merely expressed puffery and were not actionable); *see also Wendling v. Pfizer, Inc.*, 2008 WL 833549 at *4 (N.J. Super. Ct. App. Div. Mar. 31, 2008) (affirming the dismissal of a CFA claim premised on the statement that a certain veterinary product would “prevent and control parasites every day”).

Having reviewed the Amended Complaint, the Court is persuaded that plaintiff has not sufficiently pleaded a claim under the CFA.² Plaintiff fails to explain how DBCC’s licensed use of the “Dun & Bradstreet” logo constitutes a false or misleading statement of fact, and it offers no basis for treating DBCC’s touting of CreditBuilder “as a unique D&B-related product” and “the solution to false entries” on plaintiff’s credit report as anything other than non-actionable puffery. Plaintiff also neglects to provide the details necessary to draw a causal connection between DBCC’s marketing materials and plaintiff’s purchase of CreditBuilder or between DBCC’s marketing materials and any

² Although district courts in New Jersey have applied the heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b) to claims brought under the CFA, *see Lieberman*, 865 F. Supp. 2d at 539; *see also Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 279 (D.N.J. 2011), the Court declines to do so in this case. Both *Lieberman* and *Green* relied on *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007), which involved a common law fraud claim and a related CFA claim. The “unlawful practice” at issue in *Frederico* was a process “intended to delay the return of rental vehicles” to enable the defendant to “profit from charging . . . excessive ‘late’ rental return fees.” 507 F.3d at 202. Thus, the CFA claim in *Frederico* was premised on the fraud prongs of the statute, as opposed to the misrepresentation provisions, rendering Rule 9(b) germane. *See* Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”). In the matter pending before the Court, plaintiff invokes the portions of the CFA aimed at misrepresentations, and the Court concludes that the applicable pleading standards are those articulated in Federal Rule of Civil Procedure 8(a).

1 ascertainable loss plaintiff might have suffered. Instead, the operative pleading indicates
2 merely that plaintiff bought CreditBuilder in May 2011 and May 2012, and that D&B's
3 database contained two errors about plaintiff's financial status in February 2014. These
4 allegations do not a CFA claim make.

5 **C. Negligent Misrepresentation**

6 Under New Jersey law, to prevail on a claim for negligent misrepresentation, a
7 plaintiff must show that the defendant negligently made an incorrect statement of fact on
8 which the plaintiff justifiably relied. *Alexander v. CIGNA Corp.*, 991 F. Supp. 427, 440
9 (D.N.J. 1998); *see also Singer v. Beach Trading Co.*, 876 A.2d 885, 890-91 (N.J. Super.
10 Ct. App. Div. 2005). Plaintiff's common law claim suffers from the same flaws as its
11 statutory claim. The Amended Complaint fails to articulate any erroneous statement of
12 fact uttered by DBCC, make any allegation tending to show that DBCC acted in a
13 negligent manner, or describe a sequence of events demonstrating that plaintiff justifiably
14 relied on any of DBCC's representations.

15 **Conclusion**

16 For the foregoing reasons, the Court ORDERS:

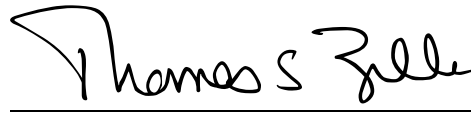
17 (1) DBCC's motion to dismiss, docket no. 66, is GRANTED;

18 (2) Counts I and II of the Amended Complaint, docket no. 64, are
19 DISMISSED, without prejudice, and with leave to file a motion to amend; any such
20 motion shall include a redlined version of a proposed second amended complaint and
21 shall be filed within thirty-five (35) days of the date of this Order; and
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1 (3) The Clerk is DIRECTED to send a copy of this Order to all counsel of
2 record.

3 IT IS SO ORDERED.

4 Dated this 19th day of October, 2015.

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7 Thomas S. Zilly
8 United States District Judge
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